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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 SaleBuild, Inc. et al.,
10 Plaintiffs,
11 v.
12 Flexisales, Inc.,
13 Defendant

Case No.: 2:12-cv-1403-JAD-GWF

**Order Granting Defendant
Flexisales Inc.'s Motion to Dismiss
[Doc. 34] on Forum Non Conveniens
Grounds**

This is a trade-secrets case between an established enterprise and an upstart company that compete in the sales-lead-generation business. The established venture is comprised of two distinct businesses: Salebuild, Inc., a Delaware corporation with its principal place of business in California (“Salebuild California.”), and Salebuild ITES, a company organized under the laws of the Republic of India (“Salebuild India”). Several of Salebuild India’s former employees left the company and founded Flexisales Marketing, a corporation organized under the laws of the Republic of India (“Flexisales India”). They also formed a corporation in Nevada—Flexisales, Inc. Plaintiffs allege that Flexisales India then hired away some of Salebuild India’s data handlers and used these new recruits to appropriate Salebuild’s lead lists, which Flexisales then sold to its own customers, passing the lists off as Flexisales’ own. Plaintiffs further allege that these former Salebuild India employees were under confidentiality agreements with Salebuild India, governed under Indian law, that forbade them from misappropriating the lists.

28 Salebuild California and Salebuild India (collectively, "Salebuild") sued Flexisales

1 and Does 1-10 in the District of Nevada, alleging: wrongful misappropriation or use of trade
2 secrets in violation of NRS § 600A.010, intentional interference with existing business
3 relations, wrongful interference with prospective business advantage, wrongful interference
4 with contractual relations, and deceptive trade practices under NRS § 598.0915. Salebuild
5 requests both legal and equitable relief. Although Salebuild did not name Flexisales India as
6 a defendant, the Complaint is saturated with allegations of wrongdoing by Flexisales India.
7 See, e.g., Doc. 1 at ¶¶ 6, 17, 19-21, 30-32, 34, 38-40, 43, 47-49, 52, 55-57, 59-60, 62, 64-66.
8 Salebuild also prays for relief from Flexisales India including disgorgement, an accounting,
9 damages, and injunctive relief. Doc. 1 at 13.

Flexisales now moves to dismiss this case primarily¹ under the doctrine of forum non conveniens. Doc. 34. The Court has thoroughly considered all of the parties' submissions and the arguments advanced at the December 6, 2013, hearing on this motion. Because this lawsuit overwhelmingly belongs in India, the Court grants the motion to dismiss on forum non conveniens grounds.

Discussion

Under the doctrine of forum non conveniens, “[a] district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties.” *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001); *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 429-30 (2007). Because application of the doctrine of forum non conveniens results in dismissal, it is a “drastic exercise of the court’s inherent powers.” *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1225 (9th Cir. 2011) (internal quotation marks omitted). “[T]he standard to be applied [to a motion to dismiss on forum non conveniens grounds] is whether . . . defendants have made a clear showing of facts which . . . establish such

¹ Salebuild raises other arguments in support of dismissal: (1) that all claims should be dismissed because Salebuild failed to join all required parties under Rule 19; (2) Salebuild's wrongful interference with contractual relations count must be dismissed for lack of jurisdiction and improper venue; and (3) Salebuild's claims for intentional interference with existing business relations and deceptive trade practices must be dismissed for failure to state a claim. As the Court is dismissing this action under the doctrine of forum non conveniens, it does not reach these alternative arguments.

1 oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience,
 2 which may be shown to be slight or nonexistent" *Cheng v. Boeing Co.*, 708 F.2d 1406,
 3 1410 (9th Cir. 1983). To obtain dismissal on forum non conveniens grounds, a defendant
 4 must demonstrate that an adequate alternative forum exists and that private and public
 5 interest factors favor trial there. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).
 6 The Ninth Circuit also requires the District Court to make a choice of law determination prior
 7 to dismissing the action. *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078,
 8 1090 (9th Cir. 1999). "At its core, the doctrine of forum non conveniens is concerned with
 9 fairness to the parties." *Gutierrez v. Advanced Medical Optics, Inc.*, 640 F.3d 1025, 1030
 10 (9th Cir. 2011).

11 **A. India Is an Adequate Alternative Forum**

12 The Court first determines whether Indian courts are capable of providing the plaintiff
 13 the remedy sought, which "ordinarily exists when defendants are amenable to service of
 14 process in the foreign forum" and "the entire case and all parties can come within the
 15 jurisdiction of that forum." *Dole Food Co. v. Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002)
 16 (quotation omitted). To be adequate, a forum need not provide the identical relief sought in
 17 the chosen forum but must be able to provide plaintiffs with "some remedy." *Lueck*, 236
 18 F.3d at 1143; *Gemini Capital Group, Inc. v. Yap Fishing Corp.*, 150 F.3d 1088, 1092 (9th
 19 Cir. 1998) (finding that simply because plaintiff could not assert RICO cause of action under
 20 foreign law did not preclude forum non conveniens dismissal). That the alternative forum
 21 might result in a less favorable opportunity of recovery for the plaintiff is of no moment.
 22 *Carijano*, 643 F.3d at 1225.

23 If defendants are amenable to service of process, an alternative forum ordinarily
 24 exists. *Piper*, 454 U.S. at 254 n.22. "A defendant's agreement to submit to personal
 25 jurisdiction of the foreign country satisfies this requirement." Judge William W. Schwarzer
 26 et al., California Practice Guide: Federal Civil Procedure Before Trial § 4:315 (The Rutter
 27 Group 2004). There is no dispute that Flexisales India would be amenable to service of
 28 process in India, and Flexisales Nevada has stipulated to submit itself to jurisdiction of the

¹ Indian courts. Doc. 34 at 5. The Court can and will condition this dismissal on Defendants' acquiescence to jurisdiction in India's courts. *Carijano*, 643 F.3d at 1234.

3 It also appears that the Indian courts would provide an adequate forum for the
4 resolution of this dispute. Flexisales offered the declaration of its Indian attorney who attests
5 that the law of India “recognizes causes of action for breach of contract and fraud” and has
6 jurisdiction to impose “money damages and specific relief in the form of mandates or
7 prohibitions.” Doc. 36 at 2.² And when Salebuild India’s own employment contracts—the
8 contracts at issue in this case—contain Indian choice of law and jurisdictional provisions,
9 *see, e.g.*, Doc. 14-4, ¶ 25.1; Doc. 14-7, ¶ 9, any argument by the Salebuild plaintiffs that
10 India’s law or courts are inadequate for the resolution of this dispute rings hypocritical. The
11 Court finds that Salebuild India’s home courts in India provide the Salebuild Plaintiffs with a
12 sufficient remedy for the wrongs it alleges in this case.

B. Balance of Public- and Private-Interest Factors

1. Private-Interest Factors

15 Private-interest factors to consider include “(1) the residence of the parties and the
16 witnesses; (2) the forum’s convenience to the litigants; (3) access to physical evidence and
17 other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the
18 cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) ‘all other
19 practical problems that make trial of a case easy, expeditious and inexpensive.’” *Lueck*, 236
20 F.3d at 1145 (quotation omitted). All of these factors strongly favor India as the convenient
21 forum.

22 Salebuild's own allegations show that these claims are primarily between Salebuild
23 India and Flexisales India and involve the acts of former employees of Salebuild India and
24 current employees of Flexisales India using computer hardware located in India. Doc. 1.
25 Two of Flexisales' three employees live in India (the other in Texas, not Nevada), Doc. 35:

²⁷ The Court may consider this declaration under Federal Rule of Civil Procedure 44.1, which broadly allows the court to consider “any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.” Fed. R. Civ. Proc. 44.1.

1 Flexisales India is based in Pune, India, and has 35 employees, all of whom live and work in
 2 India. *Id.* The former Salebuild India employees who allegedly appropriated Salebuild
 3 India's lead lists live in India. *See Doc. 1; Gemini Capital Group*, 150 F.3d at 1093 (noting
 4 that the materiality and importance of witness testimony was a relevant factor to consider).
 5 And affidavits filed by Salebuild in this matter reflect that the key witnesses in this
 6 case—along with the corporate leadership for all of the companies—live in India. *See, e.g.*,
 7 Docs. 14, 15, 33, 35, and 43. Nobody even suggests that there will likely be a single witness
 8 or document located in Nevada. The Director and Chief Operating Officer of Salebuild
 9 India—an Indian resident—has declared that the employment records related to this lawsuit
 10 “are prepared and maintained by Salebuild India” and these records are “voluminous.” Doc.
 11 14, ¶¶ 3, 12. Thus, the vast majority of the pretrial activity in this case will involve collection
 12 of information from persons and sources located in India, making it the significantly more
 13 convenient forum for this litigation. *See Creative Technology, Ltd. v. Aztech System PTE,*
 14 *Ltd.*, 61 F.3d 696, 702-03 (9th Cir. 1995).

15 Salebuild retorts that some discovery will have to occur in the United States because
 16 key emails were sent using Yahoo! and Google services, but it concedes that none of those
 17 witnesses would be located in Nevada. It also notes that some of its customers who
 18 Flexisales attempted to sell Salebuild lead lists to are located in the United States, but not one
 19 of them is located in Nevada. Doc. 50-1.

20 Salebuild also contends that its decision to sue Flexisales in its state of incorporation
 21 is strong evidence that this forum is appropriate and, as the plaintiff, its forum selection
 22 deserves deference. But a plaintiff’s choice of forum deserves less deference when the
 23 plaintiffs are foreign, as they are in this case. *See Piper*, 454 U.S. at 265-66 (noting that the
 24 strong presumption in favor of the plaintiff’s choice of forum is muted when “the plaintiff or
 25 real parties in interest are foreign.”). With no party representatives, witnesses, or relevant
 26 documents in Nevada, if this case remains in this district, every person and every evidentiary
 27 item will have to travel in from another state or another country in order to try this case here.
 28 Dismissal of this case that arose primarily between two Indian entities in India to let them

1 resolve this dispute in India serves the goals of economy, efficiency, and fairness and
 2 furthers the convenience of all parties and witnesses.

3 **2. Public-Interest Factors**

4 Public interest factors to be considered are “(1) the local interest in the lawsuit, (2) the
 5 court’s familiarity with the governing law, (3) the burden on local courts and juries, (4)
 6 congestion in the court, and (5) the costs of resolving a dispute unrelated to a particular
 7 forum.” *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1181 (9th Cir. 2006). These
 8 factors also weigh strongly in favor of dismissal for forum non conveniens.

9 *a. Local interest*

10 The local interest in this lawsuit is low if not entirely non-existent. Although Nevada
 11 has an interest in regulating companies that choose to do business in this state, the facts of
 12 the suit as alleged by the Plaintiffs turn on activities and business that took place in India, not
 13 within the borders of Nevada. And although “Nevada has a recognized interest in providing
 14 an effective means of redress for its residents,” *Levinson v. Second Judicial Dist. Court of*
 15 *State In & For Washoe Cnty.*, 742 P.2d 1024, 1026 (Nev. 1987), the Nevada resident
 16 here—defendant Flexisales—has agreed to consent to the jurisdiction of the Indian courts so
 17 that this matter can be litigated in India. Nevada has no particular interest in resolving this
 18 dispute locally, so this factor weighs in favor of dismissal.

19 *b. The Court’s familiarity with the governing law and the choice-of-law*
 20 *analysis*

21 The prevalence of Indian legal issues in this case also strongly favors dismissal. This
 22 Court must apply Nevada’s choice-of-law rules. *Klaxon Co. v. Stentor Elect. Manufacturing*
 23 *Co.*, 313 U.S. 487, 494-96 (1941). For tort actions, Nevada courts follow the “most
 24 significant relationship test” in Restatement (Second) of Conflict of Laws section 145, unless
 25 a more specific section of the Second Restatement applies. *General Motors Corp. v. Eighth*
 26 *Judicial Dist. Court of the State of Nev. ex rel. County of Clark*, 134 P.3d 111, 113 (Nev.
 27
 28

1 2006).³ Under Section 145, “The rights and liabilities of the parties with respect to an issue
2 in tort are determined by the local law of the state which, with respect to that issue, has the
3 most significant relationship to the occurrence and the parties.” Restatement (Second) of
4 Conflicts of Laws section 145. This test centers on the “contacts” between the parties,
5 including (1) the place where the injury occurred; (2) the place where the conduct causing the
6 injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of
7 business of the parties; and (4) the place where the relationship, if any, between the parties is
8 centered. *Id.* The test sets these contacts against general “principles” enumerated in Section
9 6 of the Second Restatement, which include (1) the needs of the interstate and international
10 systems; (2) the relevant policies of the forum; (3) the relevant policies of other interested
11 states and the relative interests of those states in the determination of the particular issue; (4)
12 the protection of justified expectations; (5) the basic policies underlying the particular field
13 of law; (6) certainty, predictability and uniformity of result; and (7) ease in the determination
14 and application of the law to be applied. *Id.* Of these principles, several are of heightened
15 importance for tort suits, “particularly the state with the dominant interest in the
16 determination of the particular issue, and ease in the determination and application of the law
17 to be applied.” *Id.* at Comment (b).

18 The “dominant interest” and “ease of determination” factors require the Court to apply
19 Indian law. Plaintiffs allege that “employees of . . . SaleBuild India” executed “and delivered
20 to it employment agreements . . . that prohibit them from” misappropriating trade secrets and
21 proprietary information from Salebuild “that they learned or acquired as an incident of their
22 employment for Salebuild India.” Doc. 1 at 5. The alleged theft of Salebuild’s intellectual
23 property occurred in India, by Salebuild India’s data handlers who allegedly appropriated the
24 lead lists from Salebuild India’s computer servers and gave them to Flexisales India. In so
25 doing, each Indian employee allegedly violated a confidentiality agreement with Salebuild

³ No more specific section of the Restatement applies to any of these claims.

1 India—agreements expressly governed by Indian law.⁴ Indeed, the only actionable facts that
 2 allegedly occurred outside of India are two alleged sales of its two lead lists that Salebuild
 3 itself represents occurred in California and New York. Salebuild’s voluminous filings never
 4 claim that any lead lists were sold in Nevada; the parties acknowledge that the only thing
 5 Flexisales did in Nevada was incorporate here. And although Salebuild selectively chose not
 6 to sue Flexisales India, which would create a suit between two Indian companies, a
 7 California Company, and a Nevada company, the real parties in interest undoubtedly include
 8 Flexisales India, which tips the balance of this factor in favor of applying Indian law.⁵

9 Consideration of the other factors, all of diminished importance here, does not alter
 10 this result. And specific consideration of each of Salebuild’s five causes of action also yields
 11 the conclusion that Indian law should apply to this case. Count 1 of the complaint alleges
 12 that Flexisales conspired with Flexisales India to wrongfully deprive Salebuild of its India-
 13 generated intellectual property, by recruiting Salebuild’s former Indian employees. Doc. 1 at
 14 6-8. Indian law should apply to this cause of action. Counts 2 and 3 allege that Defendants’
 15 use of Salebuild’s intellectual property is designed to disrupt Salebuild’s contractual
 16 relationship with third party customers none of which are in Nevada. *Id.* at 8-10. Regardless,
 17 the intellectual property at issue was allegedly obtained in India, by Indian employees of
 18 Salebuild India with employment agreements governed by Indian law, all of which suggests
 19 that Indian law applies. Count 4 alleges a wrongful interference with Salebuild’s contracts
 20 with its former employees, which are expressly governed by Indian law. *Id.* at 11-12. Indian

21 ⁴ See Doc. 14-4 at 12, ¶ 25.1 (“GOVERNING LAW & JURISDICTION. This Agreement shall be
 22 governed by and construed in accordance with the laws of India and the courts of Pune shall have the jurisdiction,
 23 to the exclusion of any other Courts that may have jurisdiction, to decide any disputes that may arise
 24 hereunder.”); 14-7 at 7 (“This Agreement shall be governed by and construed in accordance with the laws of the
 25 State of India without regard to conflict of law rules”).

26 ⁵ Salebuild’s allegations against Flexisales Nevada are inextricably intertwined with those against
 27 Flexisales India. Salebuild’s Complaint alleges that “Defendant and Flexisales India” collaborated in the
 28 misappropriation of Salebuild’s proprietary information. Salebuild does not contest that this information came
 to Flexisales through Salebuild’s Indian employees. Moreover, the Complaint suggests that Flexisales India is
 intimately involved in the actions giving rise to this suit. For example, Salebuild alleges that “Upon information
 and belief, at all times relevant to this action, Flexisales India is and has been an agent of and/or in active concert
 or participation with Defendant.” Doc. 1 at 2. Salebuild then distinguishes between claims brought against “all
 defendants,” and those brought against “Flexisales and Does 1-10.” See Doc. 1.

1 law plainly applies to this cause of action. Count 5 alleges that Defendants engaged in
2 deceptive trade practices by representing to their clients that the lead lists they have
3 generated are original, and not stolen. *Id.* at 12-13. Although it is not clear exactly where
4 Flexisales' activity occurred, but even Salebuild concedes that it was not likely Nevada.
5 Regardless, the *res* involved in this alleged "deception" comes from an Indian source, and
6 Indian law governs this cause of action.⁶ There is no question that Indian Courts are better
7 equipped to apply Indian law than this Court. This Court's lack of familiarity with Indian
8 law militates strongly in favor of dismissal. *See Tuazon*, 433 F.3d at 1182 (noting that
9 application of foreign law "would be a burden and would support dismissal").

c. *Burden on the courts, congestion, and the costs of resolving the dispute unrelated to a particular forum*

The remaining public-interest factors all support dismissal. When the burden on this court system is considered, dismissal of this case in favor of the Indian forum is appropriate. It is no secret that the docket in this district is overcrowded.⁷ Although Salebuild suggests that Indian trade-dispute cases can also take a substantial amount of time to resolve—from 5 to 10 years—it is not certain that the Salebuild-Flexisales dispute could be resolved in this Court with any greater speed. *See Creative Technology*, 61 F.3d at 704 (no abuse of discretion in finding judicial burden neutral where the courts of both the U.S. District Court for the Northern District of California and the courts of Singapore were “overburdened”). Finally, there is no evidence that the costs of resolving the suit in India weigh for or against

⁶ Although none of Salebuild's claims sound in contract, to the degree the Court would be obligated to apply contractual principles to the instant dispute, it would be obligated to apply Indian law. For contract actions, where the parties have not effectively chosen a forum, Nevada courts have looked to the Restatement (Second) of Conflicts of Law section 188. *Sotirakis v. United Service Automobile Ass'n*, 787 P.2d 788, 790 (Nev. 1990). Thereunder the Court looks to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the domicile, residence, nationality, place of incorporation and place of business of the parties. *Id.* (citation omitted). Regardless whether the forum selection clauses of the employment contracts between Flexisales and its employees mandated that any suit based on the contract be brought in Indian courts, the laws of India would apply to this dispute as all five of the factors suggest that Indian law should apply.

⁷ See *Zizi v. Republic Mortgage, LLC*, 2013 WL 1249654 (D. Nev. Mar. 27, 2013) (describing this District’s “already overcrowded docket”). Indeed, this motion to dismiss has been pending for more than a year.

1 keeping it here in a forum that is a complete stranger to the facts, documents, and witnesses
2 central to this dispute. On balance, all of these public-interest factors weigh in favor of
3 forum non conveniens dismissal. However, as a condition of dismissal of this suit, Flexisales
4 shall cooperate in good faith in all pretrial and trial aspects of the subsequent Indian
5 litigation, if Salebuild elects to file a suit against Flexisales there.

Conclusion

7 Flexisales has made the “clear showing of facts” that justifies application of the forum
8 non conveniens doctrine to dismiss this case. *Cheng*, 708 F.2d at 1410; *Lueck*, 236 F.3d at
9 1142. India is an not just an adequate forum but a far more appropriate one for the parties,
10 facts, and circumstances of this case, and the private and public interest factors strongly favor
11 litigating this case there. Accordingly, based upon the foregoing reasons and with good
12 cause appearing and no reason for delay, it is **HEREBY ORDERED** that Flexisales’ Motion
13 to Dismiss [Doc. 34] is **GRANTED**. All of Salebuild’s claims are hereby dismissed.

14 Although this case is now dismissed, it is **FURTHER ORDERED** that this Court will
15 retain jurisdiction over this matter until such time as the courts of the Republic of India
16 formally accept jurisdiction over the matter and the Flexisales entities submit to the
17 jurisdiction of the Indian courts. Flexisales shall file with this Court notice that the Indian
18 Courts have accepted jurisdiction over the matter no later than 30 days after any such
19 acceptance by the Courts of the Republic of India. As a further condition of dismissal of this
20 suit, Flexisales, Inc. shall cooperate in good faith in all pretrial and trial aspects of the
21 subsequent Indian litigation if Salebuild elects to refile suit in India.

DATED: December 17, 2013.

JENNIFER A. DORSEY
UNITED STATES DISTRICT JUDGE